AMERICAN ADOPTION CONGRESS

Families Rooted In Truth

JAN 29 2004

December 15, 2003

United States Department of State
CA/OCS/PRI
Adoption Regulations Docket Room
2201 'C' Street, N.W.
Washington, D. C. 20520

Re: State/AR-01/96, Proposed Regulations Concerning Intercountry Adoption, 22 CFR Part 96

Gentlemen and Ladies:

Enclosed for your consideration are two copies of the comments of the American Adoption Congress on the proposed regulations concerning intercountry adoption, 22 CFR Part 96.

Yours, etc.,

AMERICAN ADOPTION CONGRESS

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Comments of the American Adoption Congress Concerning Proposed State Department Regulations on Intercountry Adoption, 22 CFR Part 96

JAN 29 2004

The American Adoption Congress hereby submits its comments concerning the regulations proposed by the State Department to implement the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption ("the Convention") and the Intercountry Adoption Act ("IAA").

The American Adoption Congress, founded in 1978, is a national volunteer organization composed of adoptees, adoptive parents, birth parents and adoption professionals committed to adoption reform. Through education and advocacy, it attempts to promote honesty, openness and respect for family connections in adoption.

The proposed regulations, 22 CFR Part 96, contain many commendable provisions, and reflect close attention by the Department to the comments previously submitted by all parties through Acton Burnell. However, we believe that many serious problems remain.

The most serious problem is the Department's embrace of the collegial model of accreditation. As stated in the preamble concerning substantial compliance:

> The Department believes that the use of an accreditation system based on substantial compliance and the opportunity to improve, rather than a strict licensing scheme, to regulate the agencies and persons is more consistent with the regulatory approach contemplated by the IAA. (68 FR at 54080)

We believe this approach is fundamentally inconsistent with the Convention and the IAA, and will frustrate their purposes. The purpose of the Convention is "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child" (Convention, Article 1a, emphasis added). The purpose of the IAA is "to protect the rights of and prevent abuses against children, birth families and adoptive parents..." (IAA, § 2(b)(2)), emphasis added). To achieve these goals, the IAA

"mandat[es] tough, more uniform standards for those who provide international adoption services..." (H. Rept. 106-691 (2000) at p. 14; emphasis added).

To accomplish the IAA's purpose of preventing abuses by mandating tough, more uniform standards requires that accreditation under the IAA enforce those standards. A "strict licensing scheme" is required, rather than merely an "opportunity to improve." This issue is discussed in more detail in our comments below on proposed Sections 96.24, etc.

We also believe that several of the proposed regulations would improperly weaken specific provisions of the IAA and the Convention. These are discussed in our comments below concerning the provisions in question.

A further problem is the Department's attempted reliance on agreements between the Secretary and individual accrediting entities to establish standards and procedures of accreditation. As stated in more detail in our comments on Section 96.9, etc., we believe this procedure would violate both the IAA and the Administrative Procedure Act.

We respectfully suggest that correction of the substantive and the procedural aspects of the proposed regulations will require republication of amended proposals with an opportunity for further comment.

We have organized our comments to correspond with particular sections or related groups of sections of the proposed regulations, in numerical order, as follows:

§ 96.6(h). This provision requires that an accrediting entity demonstrate that "it can comply with any conflict-of-interest prohibitions set by the Secretary in the request for statements of interest." There are two problems with this proposal.

First, for the reasons stated below in our comment on §§ 96.9 *et al.*, the conflict-of-interest prohibitions must be established in the regulations themselves, promulgated by notice and comment, rather than in private agreements between the Secretary and an accrediting entity.

Second, the request for statements of interest contains no conflict-of-interest prohibitions. The request merely asks the applicants what safeguards they have.

Conflict-of-interest prohibitions will be crucial to the success of any accrediting scheme. Collegial model accrediting entities are generally beset by conflicts of interest

because the persons with sufficient experience to accredit usually currently work in the industry, have worked for it, or hope to work for it in future. In addition, the entities are often created or governed in part by members of the industry being accredited.

The regulations concerning conflicts of interest should be promulgated by notice and comment and should require that accrediting entities not be subject to any control or influence by adoption providers. The regulations should further prohibit accreditation team members and reviewers from being currently employed by an adoption provider or becoming so employed within a reasonable period (e.g. one year) after participating in any accreditation of that or any other provider.

§§ 96.9, 96.27(d) and 96.71(a). These sections provide that certain standards and procedures to be used by accrediting entities shall be determined not by the regulations subject to notice and comment, but by agreements between the accrediting entity and the State Department. In other words, these standards and procedures will be privately negotiated between the State Department and the accrediting entity without any opportunity for comment or any other input from the public. Not only is this unwise, but it violates both the IAA and the Administrative Procedure Act.

Section 203(a)(2) of the IAA requires that the Secretary, in developing the regulations that prescribe accrediting standards and procedures, "consider any standards or procedures developed or proposed by, and the views of, individuals and entities with interest and expertise in international adoptions and family social services ..." (emphasis added).

Section 203(a)(3) of the IAA requires that the regulations be developed and issued under the notice and comment provisions of 5 U.S.C. § 553(b), (c) and (d). (The exceptions in 5 U.S.C. § 553(a) are therefore not applicable.)

Among the matters that these sections of the proposed regulations would remove from public input are:

- Accrediting fees (§ 96.9(b));
- Handling of complaints (§ 96.9(c) and 96.71(a));
- Communication and accountability between accrediting entity and providers (§ 96.6(e));
- Weighting by points of each different standard (or element thereof) and the effect of such weighting (§ 96.27(d)); and
- "Other matters upon which the parties have agreed" (§ 96.9(f)).

Each of these subjects is or may be crucial, and each requires notice and an opportunity for public comment. For example, the weighting of different standards and the effect of such weighting could magnify or effectively eliminate the effect of any standard. The last item ("other matters") could create unlimited mischief.

All of the standards and procedures should be subject to both notice and comment, whether by a separate rule-making proceeding or a second round of notice and comment in this proceeding. Otherwise it is doubtful that these regulations will be upheld in court.

§§ 96.14(c)(2), 96.44(a), 96.45(b)(8) & (c) and 96.46(b)(9) & (c). These provisions require providers to assume responsibility for their agents ("supervised providers") through whom they arrange adoptions. These provisions are essential to carry out the purposes of the Convention and of the IAA. They are essential for the protection of adoptive parents, birth parents and adoptees. They are required by the IAA and the Convention.

It is both essential and appropriate that primary providers be responsible to their clients for the conduct of the "supervised providers." The primary provider selects the supervised providers, the primary provider usually has a continuing

relationship with the supervised provider, the primary provider has the knowledge and facilities to investigate the supervised provider, the primary provider usually pays the supervised provider, the primary provider can exercise infinitely more control over the supervised provider than can an adoptive parent or other client, and the adoptive parent or other client is usually inexperienced with adoption and emotionally vulnerable. If the primary provider is not responsible, the adoptive parents or other clients will usually be helpless to protect themselves.

The substance of these regulations is required by the IAA and the Convention. Section 203(b)(1)(F) of the IAA mandates that the standards for accreditation require that an accredited agency

> has established adequate measures to comply (and to ensure compliance of their agents and clients) with the Convention, this Act, and any other applicable law. (emphasis added.)

Furthermore, Article 10 of the Convention states:

> Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

A provider which fails or refuses to take responsibility for its agents or to control them can scarcely be said to have "established adequate measures ... to ensure compliance of [its] agents ... with the Convention, this Act and any other applicable law." Nor can it be said to have demonstrated its "competence to carry out properly the tasks with which" it is entrusted.

Foreign agents or "facilitators" of U. S. adoption providers have been responsible for some of the worst abuses. As the House Committee on International Relations found:

> Abuses by less reputable agencies range from the charging of exorbitant fees by so-called "facilitators" in some countries to even cases of child kidnapping and coerced parental consent.

* * *

> Stories in the press and relayed by prospective adoptive parents also described the deceptive practices of so-called "facilitators" in countries of Eastern Europe. Medical records are often not given to the prospective adoptive parents before they travel, or are incomplete, and the parents only learn upon arrival of significant medical problems. Other times, upon arrival, prospective adoptive parents are told that the child they thought they were adopting had already been adopted, but that another child (often with undisclosed medical or developmental problems) is "available."

H. Rept. 106-691, pp. 13-14.

Absent responsibility for supervised providers, unscrupulous and irresponsible providers would be free to use agents or "facilitators" who buy or abduct children or who suppress essential medical and social information about the children. So long as the agent did not explicitly inform the primary provider, the latter could avoid legal responsibility and wash its hands of the consequences. As the State Department is only too well aware, such abuses continue to happen in many foreign countries, particularly the poorest.

These provisions do not "create a private right of action" in violation of Section 504 of the IAA. They merely state requirements for accreditation. As we have stated at greater length in our comment to Section 96.39(d), the right of action for "wrongful adoption" is simply the old rights of action for negligence and fraud applied to adoption. These provisions simply do not allow primary providers to avoid their duties of due care and honesty by disclaiming responsibility for agents whom they employ and pay.

§§ 96.24(b) & (c), 96.60(a), 96.66. Taken together, these provisions would base accreditation on quadrennial examination of the provider's "documentation" and on site visit(s). The visits "<u>may</u> include, but need not be limited to, interviews with birth parents, adoptive parent(s), prospective adoptive parent(s) and adult adoptee(s) served by the [provider], interviews with the [provider's] employees and interviews with other individuals knowledgeable about the [provider's] provision of adoption services"

(§§ 96.24 and 96.60, emphasis added). The accrediting entity would also monitor providers at least annually and must investigate complaints and "may, on its own initiative, conduct site visits ... with or without advance notice, for purposes of random verification of [the provider's] continued compliance or to investigate a complaint" (§ 96.66, emphasis added).

The provisions of § 96.66 are an improvement over the drafts of Acton Burnell, but these provisions taken together still reflect priorities that are precisely the reverse of what is required, and the use of interviews is far too restricted.

Accreditation under the Convention and the IAA should focus on actual outcomes, not processes or paperwork. The primary tool of accreditation should be monitoring of actual performance by (1) interviews with clients, personnel and former personnel of providers and (2) investigation of complaints. Examining documents should be secondary.

Accreditation in other contexts is often a collegial exercise among willing participants, intended to improve performance generally. Accreditation to implement the IAA and the Convention, however, is a "safeguard to ensure that intercountry adoptions take place in the best interests of the child" (Convention, Art. 1a) and to protect rights and prevent abuses of clients (IAA, § 2(b)(2)) (emphasis added). Accreditation of adoption providers must enforce minimum standards. As the House Committee on International Relations put it, the IAA mandates "tough, more uniform standards for those who provide international adoption services" (H. Rept. 106-691 (2000) at p. 14). Encouraging "best practices" may be generally desirable, but it is not the purpose of the IAA or the Convention.

The Inspector General of the Department of Health and Human Services in 1999 found a similar problem in hospital accreditation by the Joint Commission on Accreditation of Health Care Organizations. The Inspector General stated:

> Joint Commission surveys are unlikely to detect substandard patterns of care or individual practitioners with questionable skills.

* * *

> A collegial mode of oversight is one that focuses on education and improved performance. It emphasizes a trusting approach to oversight, rooted in professional accountability and cooperative relationships. A regulatory mode focuses on investigation and enforcement of minimum requirements. It involves a more challenging approach to oversight, grounded in public accountability.
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> * * *
>
> The emerging dominance of the collegial mode may undermine the existing system of patient protection afforded by accreditation and certification practices.

(Department of Health and Human Services, Office of Inspector General, "The External Review of Hospital Quality/A Call for Greater Accountability" (July 1999)).

Implementation of the Convention and the IAA should begin with a system of accreditation which furthers their goals, not one which tends to undermine them.

We suggest that the core procedures of accreditation under the Act should include methods similar to the following:

1. The provider seeking accreditation should provide a complete list of clients (i.e. adoptive parents, prospective adoptive parents and birth parents) with whom the provider has dealt in a recent time period. The accrediting entity should question a random sample of these clients concerning the quality of services delivered by the provider. The provider must notify all such clients that they may be contacted by the accrediting entity and that they should speak freely and frankly (such notification should commence immediately to all existing and new clients). Deliberate omission of any clients required to be included would be grounds for denying accreditation.

2. The accrediting entity should examine all complaints received by the provider, by the Complaint Registry and by the accrediting agency itself (including resolved complaints) and investigate them appropriately.

3. Records of any pending or resolved lawsuits against the provider should also be reviewed.

4. The provider seeking accreditation should supply the accrediting entity with a complete list of all former employees, agents and consultants whose services terminated since the last accreditation examination. The

accrediting entity should interview some or all of these former personnel.

As a condition of accreditation, providers should be required to waive any confidentiality requirements (a) contained in settlements of lawsuits against the providers or (b) that were otherwise created or imposed in order to protect the provider.

Finally, interviews of employees and former employees should not generally be part of a site visit. Instead, such interviews should be conducted away from the provider's premises to the greatest extent possible, particularly when any wrongdoing is suspected. Employees cannot be expected to speak freely on the provider's premises, and even former employees and clients will be more inhibited on the provider's "turf" than away from it.

The techniques we recommend are widely used by the Federal Trade Commission and by corporate compliance programs to protect consumers. For most providers, these techniques will require little time and effort. Unless major abuses are found, telephone interviews of a random sample of clients and personnel will suffice. Only where material abuses are found would further investigation be required. These techniques require far less time and effort and produce far more meaningful information than the paperwork reviews on which the proposed regulations would place primary reliance.

§ 96.25(a). We suggest changing "requires" to "requests." This will make subparagraph (a) consistent with subparagraph (b). It will also eliminate any implication that the accrediting entity has a burden to prove that the requested information or documents are essential for accreditation. In case of a dispute over providing information and documents, the burden of proof should be on the provider to show that the material requested is irrelevant and unduly burdensome to produce.

Otherwise, there is great potential for obstruction and delay on the part of a provider that has something to hide.

§ 96.26(a). This provision should be deleted in its entirety. It would cloak in secrecy all information relevant to the accreditation and qualifications of a provider, except the very limited items specified in §§ 96.91 and 96.92. No purpose of this regulation nor any justification for such secrecy is stated in the preamble (p. 54080) or anywhere else that we have found.

The concerned public should have access to all information about an adoption provider unless there is a specific reason to keep certain information confidential. Adoptive parents deciding whether to use a particular provider need such information, the more specific the better. The same is even more true of adoption professionals who must evaluate and recommend providers. It is even true for birth families, if they are calm enough to make such choices.

Such members of the public are entitled to all information about a provider that they deem relevant, unless disclosure would invade some legitimate privacy interest. They are entitled to know who operates the agencies, what are their qualifications or lack thereof, what has been their track record in the past, what is their compensation, etc.

In general, if information is relevant to the decision whether to accredit a provider, the same information is relevant to any adoptive parent deciding whether to retain that provider. Again, the same is true for birth parents and adoption professionals. The information should be fully available to them on request, unless disclosure would invade some legitimate privacy interest. There is no good reason why adoptive parents, birth parents and adoption professionals should be limited to the minimal disclosures of §§ 96.91 and 96.92. For instance, why should the details of

substantiated complaints (except for identifying the information about the clients) be hidden from prospective adoptive parents?

Financial information concerning an agency is clearly not the subject of any legitimate privacy interest. Extensive financial disclosure is required of nonprofit organizations by federal and state law, in such reports as the federal Form 990 and corresponding reports required by state laws. These include functional breakdowns of income and expenses, and details of the compensation (including perks and expense accounts, etc.) of officers, directors, trustees and key employees. Such information is clearly not private. If an accrediting entity has similar information, there is no reason to require adoptive parents and members of the public to get the information from the IRS or state agencies, rather than from the accrediting entity. An accrediting entity should of course be entitled to charge reasonable fees for access and copying.

The basic principle should be freedom of information concerning providers. The burden should be upon the providers to justify withholding of information from the public.

As the Department recognizes in the preamble (p. 54068), accreditation under the IAA and the Convention is "dramatically" different from voluntary accreditation in the past. Accreditation or approval is mandatory under the IAA for providers in Convention adoptions.

Providers in Convention adoptions are not simply running a private enterprise. They are instead performing delegated governmental functions of the Central Authority pursuant to Article 22 of the Convention. The appropriate model for information disclosure and privacy is therefore the Freedom of Information Act or state analogues, rather than the privacy of an ordinary business.

Only two classes of information disclosed to an accredited agency should be confidential:

1. Information identifying individual clients (adoptive parents, birth parents and adoptees) and

2. Complaints that have been found to be false or unsubstantiated, or are still under investigation, provided the investigation is not unduly protracted.

Claims have been made that "trade secrets" of adoption providers are entitled to secrecy. What legitimate trade secrets can there be in Convention adoptions? Improved procedures should not be kept secret. Instead they should be disseminated as widely as possible to promote best practices.

Some providers appear to be using "trade secret" to refer to the agents or contacts through whom they locate available children. To regard the identity of these agents as a "trade secret" is to treat them as the source of supply of a commodity.

Such agents are either supervised providers or employees of the primary provider. In either case, there should be nothing secret about their identities.

The purpose of adoption should be to find families for children, not children for families. Keeping secret the identities of those with the best access to waiting children would pervert adoption into a business of supplying children. To maximize the chances of waiting children to find families, the identities of those who can help place such children should be as widely known as possible. Under no circumstances should they be a "trade secret."

Furthermore, not only the identities but the qualifications and track records of supervised providers and other intermediaries should be as freely available as possible.

The stated purpose of the IAA is "to protect the rights of, and prevent abuses against, children, birth families and adoptive parents...". IAA, § 2(b)(2). The guiding rule as to disclosure and confidentiality under the IAA should be the maxim attributed to Justice Brandeis, "Sunlight is the best disinfectant."

§ 96.26(b). The first sentence of this paragraph should be deleted. As stated in our comment on § 96.24, monitoring the actual practices of a provider requires a comprehensive list identifying all adoptive parent and birth parent clients. The

accrediting entity must keep such identities confidential, as provided in the remainder of § 96.26(b).

§ 96.27(a) & (d). These sections provide that accreditation will require only "substantial" compliance rather than complete compliance with the standards for accreditation. Substantiality is to be determined by a scoring or weighting system based on points to be assigned to each standard. The points and the operation of the scoring or weighting system are to be determined by negotiation between an accrediting entity and the State Department, and incorporated not in the regulations but in the agreement between the accrediting entity and the State Department.

For the reasons stated in our comments to §§ 96.9, 96.71(a) and this section, if a weighting system is to be used, it must be promulgated by notice and comment rule-making, not by private negotiations between an accrediting entity and the State Department.

Moreover, if any weighting system is to be used, it must ensure that any provider that does not meet all of the minimum requirements stated in § 203(b)(1)(A)-(F) of the IAA cannot be accredited or approved. This is explicitly required by that section of the Act.

The legislative history makes clear that the requirement was fully intended. The report of the House International Relations Committee states that Congress intended to mandate "tough, more uniform standards for those who provide international adoption services." H. Rept. 106-691 (2000), p. 14. In discussing § 203(b), both committees stated that an accredited provider "must agree to" or "must meet" the minimum requirements, each of which the reports list in summary form, joined by "and." S. Rept. 106-276 (2000), pp. 6-7; H. Rept. 106-691, pp. 25-26. There is no suggestion that the Secretary, much less an accrediting entity, can pick and choose

which of the requirements on that list a provider must meet and which it can dispense with.

Sound policy requires the same result. An agency which does not timely provide translated medical records or provide an adequate training program for prospective adoptive parents or fully disclose its policies, practices and disruption rates to prospective adoptive parents, for example, should not be arranging adoptions, regardless of any other desirable attributes the agency may have.

§ 96.33(h). We fully approve of this proposal. It reasonably implements the requirement of IAA Section 203(b)(1)(E) "to have in force adequately liability insurance for professional negligence."

The maintenance of such insurance assures that the insurers will help enforce safeguards of professional conduct, as they do in other professions.

The requirement of coverage of $1 million per occurrence is entirely reasonable. We know of many experiences where negligence or fraud in an adoption placement has required years of therapy and institutionalization, and has disrupted and bankrupted families. The actual monetary costs can easily reach $1 million.

That insurance coverage exists helps to assure that a family victimized by wrongful adoption will have some remedy. It does not mean that anyone with a frivolous claim or with lesser provable damages will collect any more than that person is entitled to. Insurers do not regard themselves as charities, and are not noted for their generosity in litigation.

§ 96.39(d). We strongly support the purpose of this provision. However, we believe the following proposed language, which is based upon language in existing federal regulations, would more effectively implement that purpose:

> The agency or person does not obtain from any Convention adoption client any agreement containing exculpatory language through which the client is made to waive or appear to waive any of the client's legal rights, or which releases or appears to release the agency or person or their agents from liability for negligence or intentional wrongdoing.

Fifteen federal departments and agencies have used similar language since 1991 to protect persons who are the subject of research. 7 C.F.R. § 1c.116 (Agriculture Dept.); 10 C.F.R. § 745.116 (Energy Dept.); 14 C.F.R. § 1230.116 (N.A.S.A.); 15 C.F.R. § 27.116 (Commerce Dept.); 16 C.F.R. § 1028.116 (C.P.S.C.); 21 C.F.R. § 50.20 (F.D.A.); 22 C.F.R. § 225.116 (A.I.D.); 28 C.F.R. § 46.116 (Justice Dept.); 32 C.F.R. § 219.116 (Defense Dept.); 34 C.F.R. § 97.116 (Education Dept.); 38 C.F.R. § 16.116 (Veterans Affairs Dept.); 40 C.F.R. § 26.116 (E.P.A.); 45 C.F.R. § 46.116 (Health and Human Services Dept.); 45 C.F.R. § 690.116 (N.S.F.); 49 C.F.R. § 11.116 (Transportation Dept.). Each of these regulations provides:

> No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

To the best of our knowledge, no case has invalidated or even questioned the validity of this language. It has been construed and discussed in several reported decisions. *Slater v. Optical Radiation Corp.*, 961 F.2d 1330, 1334 (7th Cir. 1992); *Gile v. Optical Radiation Corp.*, 22 F.3d 540, 543 (3rd Dept. 1994); *Hunsaker v. Surgidev Corp.*, 818 F. Supp. 744, 750 (M.D. Pa. 1992); *Kraemer-Katz v. U. S. Public Health Service*, 872 F. Supp. 1235, 1241 (S.D.N.Y. 1994); *Vodopest v. MacGregor*, 128 Wash. 2d 840, 857, 913 P.2d 779, 787 (1996); *Connelly v. Iolab Corp.*, 927 S.W.2d 848, 854-55 (Mo. 1996).

Many state statutes also prohibit exculpatory language waiving negligence claims in a variety of contexts, because of imbalance of bargaining power or for other reasons. E.g., Conn. Gen. Stat. § 52-572w (caterers); Del. Code, ch. 55, § 5510 (landlords); Md. Real Prop. Code, §§ 8-105 (landlords), 8A-1502 (mobile home parks); Mass. Gen. Laws, Ch. 186, § 15 (landlords); N.Y. Gen. Obl. Law, §§ 5-321 (landlords),

5-322 (caterers), 5-323 (service and maintenance contractors); 5-325 (garages and parking lots), and 5-326 (pools, gyms and places of public amusement and recreation); Uniform Residential Landlord and Tenant Act (1972), § 1.403(a)(4) (enacted in fifteen states — Alaska, Arizona, Florida, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee and Virginia).

Those in regulated occupations affected with a public interest, especially professionals rendering essential services to clients or patients dependent on them, are generally prohibited from seeking such exculpatory provisions or from relying on them. Lawyers are specifically prohibited from using such provisions, e.g., Model Code of Professional Responsibility, Disciplinary Rule 6-102 ("A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice"); *Restatement, 3d,* Law Governing Lawyers (2001) § 54(2) ("An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable").

Courts generally refuse to allow health professionals to rely on such provisions. *Tunkl v. Regents of the University of California,* 60 Cal. 2d 92, 383 P.2d 441 (1963) (hospital treating charity patient without fee); *Meiman v. Rehabilitation Center, Inc.,* 444 S.W.2d 78, 79-80 (Ky. 1969) (rehabilitation center); *Olson v. Molzen,* 558 S.W.2d 429, 430 (Tenn. 1977) (osteopath performing abortion) ("The rules that govern tradesmen in the marketplace are of little relevancy in dealing with professional persons who hold themselves out as experts and whose practice is regulated by the state"); *Emory University v. Porubiansky,* 248 Ga. 391, 282 S.E.2d 903 (1981) (dentist and dental school operating dental clinic); *Ash v. New York University Dental Center,* 164 A.D.2d 366, 564 N.Y.S.2d 308 (1st Dept. 1990) (dental clinic offering reduced fees); *Creed v. United Hospital,* 190 A.D.2d 489, 600 N.Y.S.2d 151 (2nd Dept. 1993) (fertility program; *dictum*); *Vodopest v. MacGregor,* 128 Wash. 2d 840, 913 P.2d 779 (1996) (nurse conducting research); Anno., "Validity and Construction of Contract Exempting Hospital or Doctor from Liability for Negligence to Patient," 6 ALR 3d 704 (1963) [?]

Thus there is ample precedent, administrative, legislative and judicial, for the proposed regulation. And some such regulation is essential to implement the Convention and the IAA.

Many, if not most international adoption providers now require their clients to waive all possible claims, including claims for negligence and fraud. World Child, Inc. and the Frank Foundation require their clients to waive "any and all claims" that might arise in future against those agencies. *Ferenc v. World Child, Inc.*, 977 F. Supp. 56, 60-61 (D.D.C. 1997), aff'd 172 F.3rd 919 (D.C. Cir. 1998). Alliance for Children, Inc. requires its clients to "indemnify and hold harmless [agency] from any problems or liability" and "from all liability and damages arising out of, or associated with, the placement of the child in the home of the Adoptive Parents" and to "agree not to hold [agency] ... responsible for any medical conditions which might develop, or be discovered in the future." Cooper, *Enforcement of Contractual Release and Hold Harmless Language in "Wrongful Adoption" Cases,* BOSTON BAR JOURNAL (May/June 2000), 14, 15, 27.

Such waivers have no legitimate function in international adoptions. The issue is not whether agencies should be required to guarantee the medical condition or any other aspect of the children. No law imposes any such obligation. State laws impose liability only for deceit and negligence. There is no applicable federal law; IAA § 504 specifically prohibits a private right of action under the IAA, which is the only relevant federal law.

There is no strict liability in adoption, with or without either version of the proposed regulation. Providers are simply required to exercise due care and are prohibited from lying.

Waivers such as those quoted above seek to exempt providers from even these modest requirements. A provider that cannot meet such requirements should not be arranging adoptions.

Some providers and their organizations have tried to justify such waivers as simply educating prospective adoptive parents on the risks of international adoption, especially possible medical conditions and deficiencies in medical records. Those are not the risks that adoptive parents are asked to waive. No provider is required to guarantee a child's condition or the accuracy of the medical records kept by orphanages. The risks that parents are asked to waive are that the provider and its agents may be negligent or dishonest.

A fair statement of the risks that the parents are asked to waive would have to read, in substance:

> We understand that Provider and its agents may be negligent in obtaining medical and other information about a child and in disclosing such information to us. We also understand that Provider and its agents may intentionally fail to disclose such information to us or may misrepresent such information.

Only such straightforward language could fully alert prospective adoptive parents to the risk of waiving claims of negligence and intentional wrongdoing. To the best of our knowledge, no provider is so forthright. Instead, they describe risks that appear to be outside their control. Then they add the blanket waiver that exculpates them from all claims, including negligence and misrepresentation, without using those words.

The consequences of negligence and misrepresentations in international adoptions have been horrendous. Adoptions have disrupted, stranding gravely disturbed children in custodial institutions thousands of miles from their native countries, and adoptive families have been impoverished and disintegrated by divorce. The law can do little to mend disrupted adoptions and families, but it can help avoid the economic harm. Damage awards can ameliorate the financial hardship imposed on adoptive families, and will also deter unethical providers from negligence and misrepresentation. Allowing providers to avoid the law's minimal requirements through blanket waivers leaves adoptive families to bear the burdens created by the providers' failings.

Such waivers are imposed on prospective adoptive parents. They are not the result of a fair, arm's-length bargaining process. Prospective adoptive parents are often infertile and emotionally vulnerable. They become even more vulnerable when presented with a video tape or photograph of an appealing child.

In international adoption, prospective adoptive parents are at an additional disadvantage because they must deal with foreign languages, laws and institutions. As a result, they are almost totally dependent on the providers. There is an overwhelming imbalance of bargaining power.

If providers are not responsible for negligence and misrepresentation, they are not rendering professional services, but selling children, and selling them "as is." Such practices may be acceptable in the used car business; they should have no place in adoption.

Providers and their organizations will probably cite *Ferenc, supra,* and *Regensburger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201 (7th Cir. 1998), which enforced broad waivers of liability. In the first place, those cases appear to have been inadequately argued and wrongly decided. Neither opinion mentioned the precedents cited above (*Tunkl*, etc.) which consistently refused to allow health professionals to rely on such waivers. But *Ferenc* and *Regensburger* show why the proposed regulation is essential. The outcomes of particular lawsuits can depend on which party has better legal representation and deeper pockets. That balance of forces will usually favor providers. The proposed regulation is needed to ensure that providers and their agents are reasonably careful and honest.

Some providers may claim that the proposed regulation will put them out of business. It is hard to understand how requiring reasonable care and simple honesty would have that result, but in any event the experience of other professions and businesses indicates the fear is ill-founded. Lawyers continue to practice law, although they cannot contract away malpractice liability. Doctors, dentists, hospitals and clinics continue to practice medicine and dentistry, although they also cannot contract

away such liability. Experimenters continue to work with human subjects, often at great risk, although the federal regulations cited above prevent them from exculpating themselves from negligence. And notwithstanding the multitudinous state statutes cited above, landlords, caterers, service contractors, garages, parking lots, pools, gyms, etc. remain in business notwithstanding their inability to contract out of liability for negligence. The world goes on and the sky does not fall. The affected professions and businesses simply operate more safely, and perhaps with higher insurance costs.

The proposed regulation (either as drafted by the State Department or as suggested above) does not create a new private right of action. Existing state common law long ago created rights of action for negligence and fraud. As applied to adoption, these old rights of action have acquired the name "wrongful adoption," but the causes of action are old. The proposed regulation only prevents providers from seeking to avoid their obligations under existing common law. The regulation no more creates a right of action than do the federal regulations cited above concerning informed consent, or the state statutes cited above, or Disciplinary Rule 6-102, or the decisions cited above which prohibit health professionals from avoiding their duty of due care.

Nor does the proposed regulation (in either version) shift risk. It leaves the risk exactly where existing law places it. It prevents providers from improperly shifting the risk of their own negligence and fraud onto their clients.

The IAA contemplates and indeed requires that providers be liable for negligence. Section 203(b)(1)(E) requires providers to carry "adequate liability insurance for professional negligence." This requirement will have several salutary effects, but only if the providers are subject to liability. The insurance will assure that if adoptive parents are injured by a provider's negligence, they will have a financial remedy. In effect, it will distribute the risk of such negligence among the adoptive parent clients of that provider, rather than crushing those who have the misfortune to receive a severely disturbed child. Furthermore, the insurance carriers will themselves act to assure due care by the providers in order to reduce the carriers' losses, just as

happens in industrial and commercial liability coverage. All these benefits will be lost if providers are allowed to insulate themselves from liability by contractual language.

Because of its economic consequences, the Act's requirement of insurance also mandates that waivers of this sort be prohibited by industry-wide regulation. Otherwise the insurers, in order to reduce their losses and maintain competitive premiums, might be forced to require their insured providers to extract such waivers from adoptive parents.

§ 96.42(a). We recommend that the phrase "the period of time required by applicable State law" be replaced by "a period of not less than seventy-five (75) years after the adoptee's birth."

As proposed by the Department, this section would require providers to retain adoption records only "for the period of time required by applicable State law." The preamble notes that while the Convention requires that a child's social and medical information be preserved, it does not specify the period. The preamble requests comment on whether a uniform federal time frame for retention should be included.

We believe that a uniform minimum retention period should be established in the regulations, and that it should be a minimum period of 75 years, similar to that established by § 98.2.

Preservation is required by the Convention (Art. 30). That requirement supersedes inconsistent state law, pursuant to Article VI of the Constitution and § 503 of the IAA.

Section 401(c) of the IAA provides that state law shall govern only disclosure of and access to adoption records. The IAA gives state law no role concerning preservation of adoption records.

The retention period of at least 75 years is amply justified by experience. We know of many adoptees who have sought such records in their seventies and even later.

Retention periods set by state law for records held by providers are often unreasonably short. Arizona requires attorneys to hold adoption records for only seven years (Ariz. SB 1090 (2003), sec. 2). (By contrast, attorneys have no problem retaining wills, often in bank vaults, for as long as the testators live. The attorney who drafts a will is frequently named in the will as an executor entitled to commissions.) The laws of other states set minimum retention periods that range from 22 years to "forever."

If applicable state law requires retention beyond 75 years, that state law will also apply. A state law requirement longer than 75 years will be consistent with the 75-year period, since the latter is only a minimum period. Under § 503(a) of the IAA, the Convention and the IAA supersede only inconsistent state law.

§ 96.42(d). We suggest that the words "pursuant to applicable state law" be added at the end of this provision or that the provision be deleted, in order to make clear that disclosure and access to adoption records is governed by applicable state law pursuant to § 401(c) of the IAA. The proposed language of this section might be read to impose some additional standard of privacy and non-disclosure, although that is not the Department's intention. Since the IAA specifically remits disclosure and access of adoption records to state law, we believe the best course would be simply to delete this provision.

§ 96.49(a) & (b). These provisions do not comply with the IAA and do not adequately protect prospective adoptive parents and adoptees. These provisions should be replaced by the precise language of § 203(b)(1)(A)(i) of the IAA.

IAA § 203(b)(1)(A)(i) requires an accredited agency to provide to prospective adoptive parents

> a copy of the medical records of the child (which, to the fullest extent practicable, shall include an English-language translation of such records) on a date which is not later than the earlier of the date that is 2 weeks before: (I) the adoption; or (II) the date on which the prospective parents travel to a foreign country to complete all procedures in such country relating to the adoption.

That production date is hereafter called "the statutory production date."

The two-week interval that determines the statutory production date and the "fullest extent practicable" qualification of the translation requirement were both carefully considered legislative compromises. They cannot and should not be changed by regulation.

The proposed regulation purports to require the child's medical records to be produced by the statutory production date, but it sets no date for production of the translation, and it allows production of summaries or compilations on the statutory production date while allowing the provider to produce the original medical records at an unspecified but presumably later time. These provisions do not comport with the statute and they do not adequately protect prospective adoptive parents.

The only change from the statutory language might be the substitution of "all available medical records" for the statutory phrase "the medical records." This would recognize that some records may be unavailable, while requiring the provider to make all reasonable efforts to find and produce the records.

There should be no question that both the records and the translations must be produced by the statutory production date. In our opinion the two-week period is already too short, but it is in the statute and it is a compromise between the views of groups such as ours and various provider groups. It cannot be shortened further.

§ 96.49(k). We recommend that the words "a week (unless ... decision)" be replaced by "two weeks."

This provision, as proposed, would effectively allow a provider to require prospective adoptive parents to decide whether to accept a referral of a particular child in as short a period as the provider chooses. The provision states that the minimum period of time should be at least a week "unless extenuating circumstances involving the child's best interest require a more expedited decision." As a practical matter, that language would leave it up to the provider to decide whether such "extenuating circumstances" exist. Will an accrediting team examine the record of each referral and investigate whether in fact there were extenuating circumstances?

> The regulation properly notes that prospective adoptive parents need time
>
> to consider the needs of the child and their ability to meet those needs, and to obtain physician review of medical information and other descriptive information, including videotapes of the child.

Only a very few pediatricians are qualified to advise in these cases. Their practices are very busy. One week is scarcely enough time to send them the medical information and videotapes, for them to examine it, and to advise the prospective adoptive parents. After the consultation, the prospective adoptive parents need additional time to make what is often an agonizing decision. Those are among the reasons for the two-week minimum period in § 203(b)(1)(A)(i) of the IAA.

For the reasons outlined above, the minimum period to withdraw a referral should be two weeks, with no exceptions. Anything less is both inhumane and inconsistent with the IAA.

§ 96.53(a). Section 303(a)(1)(A) of the IAA requires the provider arranging a Convention adoption involving emigration to "Ensure that ... a background study on the child is completed." The proposed regulation would require that "the agency or

person takes all appropriate measures to ensure that a child background study is performed...." The phrase "takes all appropriate measures to ensure" should be changed to "ensures" to conform with the IAA.

IAA § 303(a)(1)(A) requires results, not efforts or process. Accreditation should examine whether the results have been achieved, not just whether the right instructions are in the provider's S.O.P. The proposed regulatory language is an unnecessary and illegal weakening of the IAA requirement.

§ 96.53(c). This provision concerning required consents from birth parents and others tracks Articles 4c and d of the Convention except that the Convention requires the "competent authorities of the State of origin" (here, the accredited or approved provider, by delegation) "to ensure" that required consents have been properly obtained. The regulation weakens this to "takes all appropriate measures to ensure." That phrase, like the similar language in § 96.53(a), unnecessarily and illegally weakens the requirement of the Convention. The phrase should be replaced by "ensures."

Subsection 96.53(c)(1) states subjects on which birth parents and others must be counselled. At its end there should be added, "and that it will result in the child living in a foreign country, namely [name of country or countries intended]." It will be material to many birth parents that their consent to adoption will result in their child living abroad, and in a particular foreign country. For a parent, emigration is drastically different from adoption in this country, and emigration to a nearby, similar country like Canada differs materially from emigration to a country like Germany or Saudi Arabia.

The proposed regulation states that if the child is old enough to be counselled, the child must be told that the adoption will involve emigration (§ 96.53(c)(5)). The birth parents are even more entitled to that information, plus the specific country of

destination. To withhold such information from a birth parent, who may assume that her or his child will be adopted in this country, would be tantamount to fraud.

§ 96.54(a) & (b). We recommend:

i) In subparagraph (a), deleting "or in the case ... over the case."

ii) Replacing subparagraphs (1) and (2) of subparagraph (a) by the following:

> (1) Listing for at least thirty (30) calendar days after the birth of the child, on the internet web site _____ maintained by _____, the same information about the child (except for translation), as has been or will be given to prospective foreign adoptive parents;
>
> (2) Disseminating the same information, including the child's availability for adoption, through print, media, and other internet resources designed to communicate with potential prospective adoptive parent(s) in the United States;

iii) Deleting from subparagraph (b) the phrase "or that making such reasonable efforts was not in the best interests of the child."

Section 303(a)(1)(B) of the IAA requires that before a child residing in the U. S. may be placed abroad, the provider must have been unable "timely" to find prospective adoptive parents in the United States, despite "reasonable efforts to actively recruit and make a diligent search for" such parents. Children are often placed abroad to obtain higher fees or to evade requirements of state law such as birth father consent.

This provision of the IAA was intended to prevent such abuses. The Senate Foreign Relations Committee stated that it expected this provision to result in only "a small number of U. S. children being adopted by citizens of other countries." S. Rept. 106-276 (2000), pp. 9-10.

The regulations implementing this provision of the IAA must be sufficiently definite to prevent evasion. It is no objection that such regulations may make it so

difficult to place children abroad that very few are so placed. As noted above, Congress anticipated that result.

The proposed regulations subvert the IAA's express provisions and intent. They begin, "Except in the case of adoption by relatives or in the case in which the birth parent(s) have identified specific prospective adoptive parent(s) or in other special circumstances accepted by the State court with jurisdiction over the case...." The first exception may be justified as a humanitarian exception for a rare situation not contemplated by Congress and one which can easily be verified. The other two exceptions are entirely unjustifiable and unauthorized and should be eliminated.

The proposed birth parent identification exception is an invitation to baby-selling by unscrupulous birth parents and baby brokers, as at least one notorious recent example illustrated. Furthermore, in most cases there will be no way to know whether the identification was suggested by the birth parent, the provider or a baby broker. If this exception were allowed to remain, some providers would prepare letters for birth parents' signatures, purporting to identify specific foreign adoptive parents. Such letters would be submitted to the birth parents in the sheaf of documents that birth parents routinely sign, and would then be submitted to the state court as one more item in that sheaf. Adoption proceedings are seldom adversary; birth parents and the child seldom have genuine representation in such hearings. It is exceedingly unlikely that any judge presiding over such proceedings would independently question a claim that the absent, unrepresented birth parents identified the prospective adoptive parents. If any judge did so, we can be reasonably sure that competent adoption attorneys would thereafter avoid that judge.

The exception for "other special circumstances" is an even bigger loophole. Because adoption hearings are seldom adversary, the judges hearing them would be unlikely to question an allegation of such "special circumstances" or to find the allegations inadequate. This exception alone would completely vitiate the statute.

The remainder of § 96.54(a) is also completely inadequate. It requires the provider only to disseminate unspecified "information on the child and his or her availability" through unspecified media "designed to communicate with" prospective U. S. adoptive parents, and to list unspecified "information about the child on a national or State adoption exchange or registry" for a thirty-day period. These requirements are so vague as to be easily evaded. Any provider bent on placing a child abroad would simply find obscure media and an obscure adoption registry and emphasize the child's negative features.

We suggest that the State Department specify a single national web site, so that prospective adoptive parents can go to a single, well-known source, and that the information to be posted be exactly the same information (except for translation) as has been or will be given to prospective foreign adoptive parents. The web site could be maintained by the Department, the National Adoption Information Clearinghouse, or any other organization designated by the Department.

The last clause of proposed § 96.54(b) is flatly contrary to the IAA. It would allow a provider to avoid <u>all</u> efforts to find U. S. adoptive parents on the vague ground that making such efforts "was not in the best interests of the child." There is no such exception in the statute and none should or legally can be created. Given the perfunctory, non-adversary nature of adoption hearings in many state courts, this vague loophole would be yet another invitation to evasion. It too should be deleted.

§ 96.54(d). If the Department accepts our recommendation that § 96.53(c)(1) be amended to require that birth parents be told the country to which their child will be sent, then the phrase "and fully discloses ... United States" and the end of this section may be deleted.

§§ 96.69(a)(4) & 96.70(b)(1). We recommend that in § 96.69(a)(4), after the words "If the complaint cannot be resolved" there be inserted "within sixty (60) days," and in § 96.70(b)(1), the same phrase be inserted after the word "resolved."

Without such an amendment, unscrupulous providers could prevent the filing of complaints indefinitely by delaying resolution, and even ethical providers will be tempted to give lower priority to complaint resolution. Access to the complaint registry should be delayed no more than is needed to weed out frivolous complaints and eliminate those that can be resolved with reasonable efforts. If a dispute cannot be resolved in sixty days, there is no good reason to bar the complainant from filing with the complaint registry. A longer delay is not likely to improve the chance of resolution, but only to make the information staler.

The exact period for which a complainant would be barred from filing with the complaint registry, whether thirty, sixty or ninety days, etc., is less important than establishing some reasonable time limit. We believe that sixty days should be enough time to resolve most complaints that can be resolved amicably.

§ 96.91(b). We recommend that this proposed regulation be amended by striking "and" after subsection (2) and adding at the end of subsection (3):

> and
>
> (4) any other information concerning a specific agency or person except
>
> (A) information identifying prospective or actual adoptive parents, birth parents or adoptees;
>
> (B) complaints which have been determined to be false or substantiated; and
>
> (C) complaints which are being investigated by the complaint registry or accrediting entity and which were filed less than six months earlier.

The reasons for this recommendation are spelled out at length in our comment to § 96.26(a). The basic reason is that any information which is relevant to

accreditation is relevant to anyone trying to decide whether to retain, to recommend, or to have any relations with the provider in question, and only the three exceptions stated above would further any legitimate privacy interests.

§ 96.92(b). We recommend that this paragraph be replaced by the following:

> Unless a complaint has been found to be false or unsubstantiated or was filed less than six (6) months ago and is still under investigation, all information about the complaint may be disclosed to the public upon inquiry, except information that would identify the complainant or any prospective or actual adoptive parent, birth parent or adoptee.

The reasons for this recommendation are stated at length in our comment upon § 96.26(a).

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Respectfully submitted,

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